Washington and Lee Law Review

Volume 34 | Issue 2 Article 6

Spring 3-1-1977

Ii. Civil Procedure

cargo damage distinction remains viable. The Fourth Circuit also rejected the district court's reliance on legislative intent as justification for its holding.[45] The Fourth Circuit found that the language of the Ship Mortgage Act plainly grants tort liens priority without exception; and that in view of such clear statutory language, an intent of Congress to subordinate cargo claims is immaterial.[46]

The basis of the Fourth Circuit's *Oriente* decision was case precedent[47] which has interpreted the language of the Ship Mortgage Act to allow cargo claims in tort. The district court, in contrast, focused on the policy of lien priority law and the legislative intent behind the Ship Mortgage Act. The district court attempted to distinguish *Oriente* from case precedent on the basis of the cargo claim and prepaid freight distinction,[48] while the Fourth Circuit emphasized the general language in cases allowing claims in tort.[49] This mutually exclusive dichotomy has attracted the attention of leading commentators who have split over the question of which approach is preferable.[50] Although the district court's policy approach is more equitable, the language of the Ship Mortgage Act does not indicate that cargo claims should occupy a subordinate position even when brought in tort. The *Oriente* decision, while a boon to shippers, effectively relegates repairmen and suppliers to a priority position beneath cargo claimants, and puts the mortgagee in a position less desirable than Congress intended.

MARK T. COBERLY

II. CIVIL PROCEDURE*

A. Nonparty Protective Order Not Appealable as Final Disposition of Rights

Historically, within the federal system, appellate review of trial court orders has been afforded only when those orders could be char-

[45] 529 F.2d at 233.

[46] *Id.*

[47] *See* note 22 *supra.*

[48] 374 F. Supp. at 31.

[49] 529 F.2d at 222-23.

[50] *Compare* 7A MOORE, *supra* note 1, at ¶ C.06 *and* GILMORE & BLACK, *supra* note 6, at 741, *with* Richards, *Maritime Liens In Tort, General Average, and Salvage,* 47 TUL. L. REV. 569, 581 (1973).

* The Law Review acknowledges the contribution of research by Robin M. Blackburn, a student at the Washington & Lee School of Law.

acterized as final.[1] Finality, however, is in some respects an illusory classification since almost any order of a court contains some element of finality.[2] The Supreme Court has stated quite broadly that appellate review should not halt the "orderly process" of trial court adjudication.[3] In certain instances, however, the Court has afforded some review during litigation.[4] *North Carolina Association of Black Lawyers v. North Carolina Board of Law Examiners*[5] confronted the Fourth Circuit with the issue of whether a nonparty witness could obtain appellate review of a federal district court's denial of a discovery protective order even though such an order is not a final judgment.[6]

In *Black Lawyers*, the North Carolina Association of Black Lawyers (NCABL) brought a class action suit[7] against the North Carolina Board of Law Examiners (Examiners) alleging that the annual bar admittance examination prepared and administered by the Examiners was arbitrary, unfair, and racially discriminatory.[8] Twenty-nine black law graduates who were denied admittance to the state bar because of their failure on the allegedly discriminatory examination joined the NCABL in this class action suit.[9] The Examiners denied

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[1] Andrew v. United States, 373 U.S. 334 (1963); Cobbledick v. United States, 309 U.S. 323 (1940). The doctrine of finality was first declared in the Judiciary Act of 1789, ch. 20, §§ 21-22, 25, 1 Stat. 73. The doctrine is presently codified at 28 U.S.C. § 1291 (1970), which provides in pertinent part: "The courts of appeals shall have jurisdiction from all final decisions of the district courts of the United States . . . ." *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 101 (3d ed. 1976) [hereinafter cited as WRIGHT]; P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, ch. 11 (2d ed. 1973); Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539 (1932).

[2] Alexander v. United States, 201 U.S. 117, 121 (1906).

[3] Cobbledick v. United States, 309 U.S. 323, 326 (1940), *citing* Segurola v. United States, 275 U.S. 106, 112 (1927).

[4] *See* text accompanying notes 32-53 *infra.*

[5] 538 F.2d 547 (4th Cir. 1976).

[6] *See, e.g.,* Cobbledick v. United States, 309 U.S. 323 (1940); Louie v. Carnevale, 443 F.2d 912 (9th Cir. 1971).

[7] The class action suit was pleaded under FED. R. CIV. P. 23. The proposed class included the North Carolina Association of Black Lawyers, the twenty-nine black applicants who had failed the bar admittance examination, and all prior and future black applicants who failed or will fail the allegedly discriminatory examination. 538 F.2d at 548.

[8] 538 F.2d at 548.

[9] *Id.* Under FED. R. CIV. P. 23 (c)(1), the district court has the responsibility of determining whether the action is suitable for class action litigation. The court's ability to fix the scope of the class represented in the action was suggested by the Fourth Circuit as a possible solution to the discovery objection raised in *Black Lawyers. See* text accompanying note 25-31 *infra.* By limiting the size of the class, the volume of

these allegations and additionally alleged that the failure of the specified black applicants was caused by their poor scholastic standing and deficiencies in their legal education.[10] In order to establish these deficiencies, the Examiners sought extensive discovery from North Carolina Central University Law School (NCCU) and its faculty where twenty-seven of the twenty-nine law graduates had received their legal education.[11] When the trial judge refused to issue a protective order enjoining further allegedly burdensome discovery,[12] NCCU appealed to the Fourth Circuit for review of the adverse ruling on its motion.[13]

The Fourth Circuit held that the refusal of a motion for a protective ban on discovery was not appealable.[14] The court based this holding on an application of the collateral order rule announced in *Cohen v. Beneficial Industrial Loan Corp.*[15] In *Cohen,* a federal district court entered a preliminary order that a state statute requiring substantial security in stockholders derivative actions was not applicable in a federal court exercising diversity jurisdiction.[16] On appeal of this order,[17] the Supreme Court set out three conditions necessary before an appellate court may review such an order. First, the order

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discovery sought by the Examiners presumably could be lessened. 538 F.2d at 549.

[10] 538 F.2d at 548.

[11] *Id.*

[12] NCCU was denied the protective order provided for in FED. R. CIV. P. 26 (c), and 45 (b) and (d). Rule 26 (c) provides: "Upon motion . . . by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a . . . person from annoyance, embarassment, oppression or undue burden or expense . . . ." Rule 45 (b) and (d) establish that subpoenas for the production of documentary evidence and for taking depositions are subject to the provisions of Rule 26 (c).

[13] 538 F.2d at 548.

[14] The statutory sections cited by the Fourth Circuit were 28 U.S.C. §§ 1291, 1292 (1970). 538 F.2d at 548. *See* note 1 *supra.* 28 U.S.C. § 1292 provides for appellate review of certain interlocutory orders of district courts. *See generally* WRIGHT, *supra* note 1, at § 102. The NCCU appeal did not qualify under any of the specific situations warranting appeal under § 1292 (a). The absence of the necessary certification of the district judge prohibited interlocutory appeal under 28 U.S.C. § 1292 (b) (1970). *See* text accompanying notes 32-35 *infra.*

[15] 337 U.S. 541 (1949).

[16] *Id.* at 545. The Supreme Court reasoned that the district court's order was a final decision on the applicability of the state statute. The opinion continued that since this order did not make any step toward final disposition of the merits of the case it was not interlocutory in nature. *Id.* at 546.

[17] The Third Circuit reversed the trial court's order and held that the state statute requiring security in stockholder derivative actions was applicable to diversity actions in federal courts. *Id.*

must be a final disposition of a claimed right.[18] Second, the issue raised by the order must be severable from the underlying cause of action.[19] Finally, the issue must raise an important and unsettled question of law which should not be deferred for appellate consideration until the whole case is adjudicated.[20]

In *Black Lawyers,* the Fourth Circuit found that the district order failed to meet the final two requirements.[21] NCCU's status as a nonparty to the original litigation did not make its objection to the order collateral to the underlying suit. Rather, the discovery sought by the Examiners formed an integral part of the action.[22] The court also

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[18] *Id.* at 546-47. In *Cohen,* the corporate right to indemnity before prosecution was the claimed right. *Id.* at 545.

[19] *Id.* at 546.

[20] *Id.* The evolution of the *Cohen* doctrine reached the sharpest departure from notions of finality in Gillespie v. United States Steel Corp., 379 U.S. 148 (1964). There, in a suit for wrongful death, the district court had stricken all parts of the complaint pleading for recovery by the decedent's brothers and sisters. *Id.* at 150-51. Although these plaintiffs had a right to appeal upon completion of the suit brought by the remaining plaintiff, the Supreme Court declared that the doctrine of finality must be given a practical rather than a technical construction. *Id.* at 152, *citing* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). The Court looked to the practical result of a second drawn-out trial if the order was on later appeal found to be erroneous. Appeal was therefore allowed under what the Court itself termed a marginal circumstance. 379 U.S. at 154. *See* WRIGHT, *supra* note 1, § 101 at 511; Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals,* 3 GA. L. REV. 507, 515 (1969); Frank, *Requiem for the Final Judgment Rule,* 45 TEXAS L. REV. 292, 305 (1966).

[21] 538 F.2d at 548.

[22] *Id.*

[23] *Id.* The court relied on three principal cases to establish the non-appealability of an intermediate procedural question when the question could not be resolved independently of the substance of the litigation. In Borden Co. v. Sylk, 410 F.2d 843 (3d Cir. 1969), the defendant in the action refused to answer a question at deposition because he challenged the relevance of the inquiry. He alleged that his status as a nonparty to the third party complaint which engendered the discovery made his appeal of the discovery order collateral and therefore immediately appealable. *Id.* at 845. The Third Circuit refused review, holding that the relevance of discovery necessarily entails consideration of the substance of the litigation and cannot be considered as a collateral issue. *Id.* at 846. The second case considered by the Fourth Circuit was United States v. Ryan, 402 U.S. 530 (1971). In *Ryan,* the court of appeals granted an appeal of a discovery order which required the production of books, records, and documents located in Kenya. The order provided that since the material was located in Kenya and was subject to Kenyan law forbidding removal of such records without governmental approval, the respondent need only apply for approval to remove the materials. If approval was denied, submission to discovery was to take place in Kenya. *Id.* at 531. The Supreme Court held that such an order was not appealable since an adequate appeal would be afforded based on a contempt citation for refusal to apply for approval or to produce the material in Kenya. *Id.* at 533. Finally, in Ryan v. Commissioner, 517

found that the issue of the appealability of a district court's protective order was not an unsettled question of law; instead, prior case law had uniformly established that such orders were unappealable.[23] Because NCCU failed to establish the requirements for appealability as a collateral order, the Fourth Circuit found this order concerning the scope and conduct of discovery within the discretionary powers of the district court.[24]

The Fourth Circuit, however, recognized the difficult situation in which NCCU was placed.[25] As a nonparty witness, NCCU could either submit to what it considered unduly burdensome discovery, or ignore the trial court's order and face a possible contempt citation. A contempt citation, uniformly recognized as a final judgment,[26] affords what the Supreme Court has termed "adequate" means of appeal.[27] Realistically, however, this appeal is often an ineffectual remedy given the general framework of the Federal Rules of Civil Procedure which provide for a broad scope of discovery.[28] Broad discovery coupled with the moving party's burden of showing good cause for the issuance of a protective order[29] has produced a marked hesitation on the part of federal courts to accept a claim of inconvenience as cause for preventing discovery.[30] Given this theoretically "adequate" yet

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F.2d 13 (7th Cir.), *cert. denied,* 423 U.S. 892 (1975), a nonparty witness refused to answer interrogatories on grounds that the inquiry was irrelevant. The Seventh Circuit held that since the relevance of the information could be resolved by reference to the substantive litigation, the collateral order rule announced in *Cohen* was inapplicable. *Id.* at 17.

[24] 538 F.2d at 549.

[25] *Id.*

[26] Any contempt citation, whether civil or criminal, is considered to be an appealable final judgment for a nonparty. Alexander v. United States, 201 U.S. 117, 121 (1906). A distinction is made, however, for parties to the litigation where only criminal contempt affords immediate appellate review. Fenton v. Walling, 139 F.2d 608, 609 (9th Cir. 1943), *cert. denied,* 321 U.S. 798 (1944); *see generally* 9 MOORE'S FEDERAL PRACTICE ¶ 110.13 [4], at 164-66 (2d ed. 1976). The difference between the two types of contempt citations is not always clear, as some courts have manipulated the labels by imposing a fine or otherwise identifying contempt of a discovery order as criminal, thereby allowing appeal. Hickman v. Taylor, 329 U.S. 495, 500 (1947); Hanley v. James McHugh Const. Co., 419 F.2d 955, 956 (7th Cir. 1969); Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921, 923 (4th Cir. 1962), *cert. denied,* 375 U.S. 985 (1964).

[27] Alexander v. United States, 201 U.S. 117, 121 (1906).

[28] Hickman v. Taylor, 329 U.S. 495, 507 (1947).

[29] FED. R. CIV. P. 26 (c). *See* note 12 *supra.*

[30] White v. Wirtz, 402 F.2d 145, 148 (10th Cir. 1968); United States v. Pardome, 30 F.R.D. 338, 341 (W.D. Mo. 1962); Kamin v. Central States Fire Ins. Co., 22 F.R.D. 220 (E.D.N.Y. 1958); Morrison Export Co. v. Goldstone, 12 F.R.D. 258, 260 (S.D.N.Y. 1952); Glick v. McKesson & Robbins, Inc., 10 F.R.D. 477, 479 (W.D. Mo. 1950); United States *ex rel.* Edelstein v. Brussell Sewing Mach. Co., 3 F.R.D. 87, 88 (S.D.N.Y. 1943).

practically unacceptable requisite for review, future challenges to discovery orders by nonparty witnesses should not only explore alternative methods of testing such orders,[31] but should also raise justifications for opposing the discovery which are stronger than mere inconvenience.

Alternative methods to a *Cohen* collateral order method of gaining appellate review of discovery orders have been recognized although none have been uniformly successful. As discovery orders are interlocutory in nature, they may be appealable under the Interlocutory Appeals Act of 1958.[32] The Act permits an appeal when the district judge and the court of appeals find that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation."[33] Although the trial judge in *Black Lawyers* indicated a substantial interest in the propriety of his order by suspending enforcement until the appeal of NCCU was heard,[34] the Fourth Circuit's classification of the order as an "intermediate procedural question" seemingly removed this protective order from review under the discretionary provisions of § 1292 (b).[35]

Another method of obtaining review which has been used with increasing frequency, although not exclusively for interlocutory appeals, is the petition for writ of mandamus.[36] Traditionally, use of mandamus has been limited to "clear and indisputable"[37] situations where appeal is an inadequate remedy[38] and where the writ is necessary to prevent a grave miscarriage of justice.[39] Courts denying writs of mandamus in discovery disputes typically have observed that the issues raised could be subsequently treated on appeal with no irreparable harm suffered as a result of the delay.[40] Under this traditional

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[31] *See Developments in the Law-Discovery*, 74 HARV. L. REV. 940, 995-1000 (1961).

[32] 28 U.S.C. § 1292 (b) (1970).

[33] *Id.*

[34] 538 F.2d at 548.

[35] *Id.*

[36] *See* 9 MOORE'S FEDERAL PRACTICE ¶ 110.26, at 283-84 (2d ed. 1976); Note, *Supervisory and Advisory Mandamus under the All Writs Act*, 86 HARV. L. REV. 595 (1973).

[37] Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953), *citing* United States v. Duell, 172 U.S. 576, 582 (1899).

[38] *Ex parte* Fahey, 332 U.S. 258, 260 (1947).

[39] Parr v. United States, 351 U.S. 513 (1956); Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943); Hartley Pen Co. v. United States Dist. Ct., 387 F.2d 324 (9th Cir. 1961).

[40] Cmax v. Hall, 290 F.2d 736, 738-39 (9th Cir. 1961); Byram Concretanks, Inc. v.

standard for the issuance of writs of mandamus, the Supreme Court's declaration of the adequacy of an appeal following a contempt citation[41] would seem to remove the NCCU order from eligibility for a writ.

Within the past twenty years, however, the Supreme Court has extended to the courts of appeals the discretionary power to issue writs of mandamus in "exceptional" circumstances to insure the proper judicial administration of the federal court system.[42] In the leading case of *Schlagenhauf v. Holder,*[43] a trial judge ordered a party to undergo physical and mental examinations under Rule 35 (a) of the Federal Rules of Civil Procedure without affording a hearing prior to issuing the order.[44] The Court found that this controversy, involving the first challenge[45] to the district courts' power under Rule 35 (a), constituted an issue that demanded appellate supervisory control through a writ of mandamus.[46] *Schlagenhauf* held that where there is a substantial allegation of "usurpation of power" by a district judge on an issue of first impression affecting future federal judicial administration, the courts of appeal have the power to resolve the issue through the issuance of a writ of mandamus.[47] The Fourth Circuit has exercised this supervisory mandamus power when a district court has ignored the court of appeal's precedental holding as to governmental privilege.[48]

Meaney, 286 F.2d 170, 171 (3d Cir. 1961) (per curiam); Fisher v. Delehant, 250 F.2d 265, 268 (8th Cir. 1957); National Bondholders Corp. v. McClintic, 99 F.2d 595, 598 (4th Cir. 1938).

[41] *See* text accompanying notes 26-27 *supra.*

[42] LaBuy v. Howes Leather Co., 352 U.S. 249 (1957). In *LaBuy,* a district court judge ordered that a difficult case be heard by a master because of the district court's congested calendar. The Seventh Circuit, however, issued a writ of mandamus directing the judge to hear the complex litigation himself. The Supreme Court held that the writ was properly issued under the circumstances of the district judge's order. Although most antitrust litigation is complex, complexity alone does not justify denial of a trial before a court. *Id.* at 259. The Court held that the court of appeals' writ of mandamus was properly directed to effect appellate supervision of the federal court system. *Id.* at 259-60. The use of masters under FED. R. CIV. P. 53 was held "to aid judges in the performance of specific judicial duties" and not to displace the court. 352 U.S. at 256, *citing Ex parte* Peterson, 252 U.S. 300, 312 (1920).

[43] 379 U.S. 104 (1964).

[44] *Id.* at 108-09.

[45] *Id.* at 110.

[46] The Seventh Circuit refused to issue the writ. The Supreme Court granted certiorari to consider the supervisory mandamus issue. *Id.* at 109.

[47] *Id.* at 111.

[48] In United States v. Hemphill, 369 F.2d 539 (4th Cir. 1966), the court issued a supervisory writ of mandamus where the district judge's order was subject to a sub-

In a recent case, *United States Parole Board v. Merhige,*[49] the Fourth Circuit firmly established that it no longer viewed mandamus as confined to the traditional role of appellate correction of clear error going to the question of jurisdiction or power of the lower courts.[50] The *Merhige* Court issued a writ of mandamus to prevent depositions and interrogatories where the discovery would effect a disruptive and unwarranted intrusion upon the records of the Board of Parole.[51] The court held that this supervisory mandamus would shape future discovery procedures throughout the circuit.[52] Efforts to rely on *Schlagenhauf* to support appellate review of discovery rulings for the purpose of providing a uniform application of discretionary discovery decisions within each circuit have been unavailing, however.[53] This restriction of the supervisory mandamus role of the courts of appeal negates the effectiveness of such a measure in the *Black Lawyers* discretionary discovery order context.

Since the alternative methods of procuring appellate review do not appear to increase appreciably the likelihood of successful appeal in a *Black Lawyers* situation, transforming objections to the discovery order from a claim of undue burden to one of privilege might offer a nonparty witness the only avenue for review of the discovery order without a contempt citation. In *Covey Oil Co. v. Continental Oil*

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stantial allegation of usurpation of power. There, the district judge ordered the Secretary of Labor, a nonparty to the suit, to disclose the names of all witnesses with information regarding the issues of the controversy. The Fourth Circuit found this order clearly erroneous in light of the qualified privileges established in Wirtz v. B.A.C. Steel Prods., Inc., 312 F.2d 14 (4th Cir. 1962), that the government could withhold the names and statements of informants.

[49] 487 F.2d 25 (4th Cir.), *cert. denied,* 417 U.S. 918 (1973).

[50] *Id.* at 29-30.

[51] *Id.* at 30.

[52] *Id.*

[53] *See* Beal v. Schul, 383 F.2d 401 (3d Cir. 1967) (per curiam) (Seitz, J., dissenting); 4 MOORE'S FEDERAL PRACTICE ¶ 26.83 [9.-3], at 622 (2d ed. 1976). *But see* Winters v. Travia, 495 F.2d 839 (2d Cir. 1974) (per curiam). In *Winters,* the Second Circuit held that a district judge's order under FED. R. CIV. P. 35 for physical and mental examination, when no claim of physical or mental disability formed the basis of the plaintiff's claim, constituted an abuse of discretion and issued a writ of mandamus to compel further proceedings in the district court without requiring the plaintiff's submission to examination. 495 F.2d at 840-41. The plaintiff opposed such examination on religious grounds, since, as a practicing Christian Scientist, she would not submit to any form of medication. *Id.* at 840; U.S. CONST. amend. I. Judge Mansfield, in his concurring and dissenting opinion, argued that this use of mandamus was improper because the district judge's order was well within his discretionary powers. 495 F.2d at 842 (Mansfield, J., concurring and dissenting).

Co.,[54] a nonparty witness' special right in the material ordered discoverable facilitated immediate appellate review.[55] The Tenth Circuit in *Covey Oil* held that nonparty witnesses should not be required to submit to a contempt citation in order to obtain a determination of their claimed rights of trade secrets.[56] The distinction between an assertion of merely burdensome discovery and of discovery that entails disclosure of a trade secret, is that affirmative rights demand immediate review because submission to discovery could produce irreparable harm to the witness.[57] The *Covey Oil* court held that an affirmative right can remove the appealability issue from the traditional approach that the review following a contempt citation provides adequate recourse for appeal.[58] Under this analysis, the claim of irreparable injury by a third party witness must still be balanced against the parties' need for information during preparation for litigation.[59]

Importantly, similar immediate review has been afforded when privileged government employment records,[60] government accident investigation reports with national security implications,[61] and grand jury transcripts[62] have been made available through discovery orders despite governmental objections.[63] In *Black Lawyers,* an assertion that the discovery sought from the state university was privileged[64] might have provided the Fourth Circuit with justification for reviewing the district judge's denial of the protective order. Similarly, the entire objection to the order might have been averted if, due to the

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[54] 340 F.2d 993 (10th Cir.), *cert. denied,* 380 U.S. 964 (1965). In *Black Lawyers,* the Fourth Circuit accepted the disposition of *Covey Oil* as correct on its facts. 538 F.2d at 549.

[55] 340 F.2d at 996.

[56] *Id.* at 996-97.

[57] *Id.* at 999.

[58] *Id.* at 996.

[59] *Id.* at 999.

[60] Carr v. Monroe Mfg. Co., 431 F.2d 384 (5th Cir.), *cert. denied,* 400 U.S. 1000 (1970).

[61] United States v. Reynolds, 345 U.S. 1 (1953).

[62] United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

[63] Will v. United States, 389 U.S. 90 (1967) offers a limitation on the power of an appellate court to exercise its power of supervisory mandamus. There, the Supreme Court held that a right to an immediate appeal based on a government claim of immunity under the Federal Rules of Criminal Procedure must be balanced against the constitutional right of the defendant in a criminal proceeding to a just and speedy trial. *Id.* at 98; U.S. CONST. amend. VI.

[64] Any assertion of governmental immunity must be formally claimed and lodged by the head of the governmental department which has control over the matter. United States v. Reynolds, 345 U.S. 1, 7-8 (1953).

privileged status of the discovery material sought, the district judge's order entailed only an *in camera* review of the materials.

In the recent case of *Kerr v. United States District Court*,[65] the Supreme Court affirmed the Ninth Circuit's denial of mandamus[66] where a proper assertion of governmental privilege was not made to oppose discovery of prisoners' state correctional files.[67] The Court held that since *in camera* review was a highly appropriate and useful means of dealing with claims of governmental immunity, failure to request this convenient review by the district court makes the extraordinary writ of mandamus unavailable.[68] NCCU's appeal for review or mandamus in *Black Lawyers* might have been allowed, therefore, if NCCU asserted governmental immunity or privilege and the district judge denied any restrictive *in camera* review.

The Fourth Circuit opinion in *Black Lawyers* represents a strict application of the final decision requirement which prevents discovery orders from becoming immediately appealable. This requirement is designed to eliminate delay and promote the efficient handling of cases.[69] The right of appeal gives the appellant an instrument for delay which must be weighed against the great value placed on efficient judicial administration.[70] When discovery is opposed, as it was in *Black Lawyers*, solely because it is burdensome or inconvenient, the nonparty appellant has no claim of irreparable harm justifying delay of litigation by appellate review of a trial judge's interlocutory order. Such an appeal could only serve to threaten the right of litigants to a speedy determination of the merits of the controversy, and might inundate courts with unwarranted appeals. A policy which allows appeals only after a contempt citation is one effective way of minimizing appeals and screening frivolous claims. *Black Lawyers* thereby utilizes the principle of finality to distribute important discretionary discovery authority to the district courts within the federal judicial hierarchy.[71]

B. Abstention Doctrine: Federal Judicial Intervention Appropriate In Case Alleging Bad Faith and Harassment

While *North Carolina Association of Black Lawyers v. North Car-*

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[65] 96 S. Ct. 2119 (1976).

[66] Kerr v. United States Dist. Ct., 511 F.2d 192 (9th Cir. 1975).

[67] 96 S. Ct. at 2126.

[68] *Id.* at 2125.

[69] *Id.* at 2124.

[70] 4 MOORE'S FEDERAL PRACTICE ¶ 26.83 [11], at 26-632 (2d ed. 1976).

[71] *See* Cobbledick v. United States, 309 U.S. 323, 330 (1940).

olina Board of Law Examiners[1] defined the division of powers within the federal judicial system, the Fourth Circuit in *Timmerman v. Brown*[2] addressed the issue of the federal judicial role vis-a-vis state judicial functions. In *Timmerman,* two prisoners at the Central Correctional Institute in Columbia, South Carolina instituted a class action suit[3] against State Magistrate Franchot A. Brown, State Solicitor John Foard, and State Department of Corrections Director William Leek alleging violations of the prisoners' first and fourteenth amendment rights[4] under 42 U.S.C. §§ 1983 and 1985.[5]

The complaint, seeking equitable and declaratory relief in addition to damages from the named defendants,[6] alleged that certain unnamed correctional officers, without justification,[7] brutally beat

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[1] 538 F.2d 547 (4th Cir. 1976).

[2] 528 F.2d 811 (4th Cir. 1975).

[3] The plaintiffs sought to represent the class of all inmates who are, have been or will be incarcerated in the Central Correctional Institute. *Id.* at 812 n.1.

[4] *Id.* at 815. The alleged violations included bad faith prosecutions of the plaintiffs and suppression of the prosecution of the correctional officials. These allegations asserted a breach of the plaintiffs' right "to petition the Government for redress of grievances", and to due process and equal protection of the laws. U.S. CONST. amend. I & XIV.

[5] 528 F.2d at 813. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985 (1970) complements § 1983 by making unlawful the conspiracy of two or more people to: (a) prevent an officer of the United States from performing his duties; (b) obstruct justice by intimidating a party, witness or juror; or (c) deprive persons of rights or privileges under the laws. This section also provides that the party injured by such conspiracy may have an action in damages against one or more of the conspirators.

[6] The plaintiffs sought money damages, a declaration that Solicitor Foard's suppression of the criminal warrants which were based on probable cause violated the plaintiffs' fourteenth amendment right, and an injunction against all defendants, except Magistrate Brown, restraining them from interference in the criminal warrant issuance process. Further, the plaintiffs requested an injunction to restrain the pending criminal prosecutions and a writ of mandamus requiring Magistrate Brown to issue criminal warrants against Timmerman's attackers. 528 F.2d at 813.

[7] Timmerman was accused of being under the influence of alcohol at the time the attack occurred. The Fourth Circuit accepted as fact the plaintiffs' allegations that this accusation was untrue. *Id.* at 812. The reason for such an assumption was grounded on the district court's finding that the plaintiffs failed to "state a claim upon which relief can be granted." FED. R. CIV. P. 12 (b)(6). Since the defendants' motion

plaintiff Timmerman.[8] After plaintiff Thomas stopped the beating, the correctional officials denied Timmerman medical treatment.[9] Defendants Brown and Foard, although fully informed of these facts and aware of the plaintiffs' desire to bring criminal charges against the officers, condoned the transfer of Timmerman and Thomas to solitary confinement where they remained as of the date of the *Timmerman* decision.[10] Despite this incarceration, the plaintiffs were able to have delivered to Magistrate Brown application for criminal warrants alleging assault and battery which Brown determined averred probable cause justifying the issuance of warrants.[11] Solicitor Foard, however, intervened in the warrant process and prevented the issuance of these warrants on the grounds that criminal warrants could be issued against correctional officials only upon his determination of probable cause based on an independent investigation by the South Carolina Law Enforcement Division.[12] The plaintiffs also alleged that they were currently subject to bad faith criminal charges arising from this same beating.[13] Although Magistrate Brown dismissed these charges, Solicitor Foard caused the county grand jury to indict the plaintiffs on substantially the same charges.[14]

The district court dismissed the complaint against Magistrate Brown and Solicitor Foard on grounds that they were immune from suit since the actions complained of concerned the exercise of their respective judicial and quasi-judicial functions.[15] On appeal, the Fourth Circuit decided two important issues raised by the appellants.[16] First, the court held that judicial and quasi-judicial immunity extends only to money damages and not to the equitable and declaratory relief sought by the plaintiffs.[17] Second, based on arguments

for dismissal asserted judicial immunity, the Fourth Circuit, proceeding under FED. R. CIV. P. 56, gave the plaintiffs, as the party opposing the motion, the benefit of all reasonable doubts in determining whether a genuine issue as to any material fact existed. FED. R. CIV. P. 12(b)(6). *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 99 (3d ed. 1976) [hereinafter cited as WRIGHT].

[8] 528 F.2d at 812.

[9] *Id.*

[10] *Id.* at 813.

[11] *Id.*

[12] The intervention by Solicitor Foard in the criminal warrant issuance process was illegal under South Carolina law. *Id.* at 813 n.2. *See* S.C. CODE § 16-105 (1962).

[13] 528 F.2d at 813.

[14] *Id.*

[15] *Id.* at 812.

[16] The district court certified the dismissal of defendants Brown and Foard as a final judgment under FED. R. CIV. P. 54 (b) finding no just reason for delaying the appeal of this order. 528 F.2d at 812.

[17] *Id.*

raised by defendants Brown and Foard that the pending state prosecution barred federal judicial intervention, the court concluded[18] that the plaintiffs' federal cause of action qualified as an exception to the restrictive abstention doctrine announced in *Younger v. Harris.*[19]

At common law, judges were immune from prosecution for offenses relating to their judicial duties.[20] The justification for such immunity followed from the idea that the threat of personal liability would inhibit judges in the exercise of their discretionary powers and would deter capable individuals from seeking judicial posts.[21] In addition, the burden of continually defending lawsuits challenging past decisions would keep judges from their primary judicial functions.[22] While the Supreme Court has accepted this common law doctrine of judicial immunity,[23] it has restrictively applied the doctrine to litigation under the Reconstruction-era Civil Rights Act.[24]

Although the text of § 1983 might be interpreted as extending personal liability to all state judges and prosecutors,[25] the Supreme Court has extended judicial immunity to shield judges[26] from liability for damages under § 1983.[27] The Court, however, has left unresolved

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[18] *Id.*

[19] 401 U.S. 37 (1971).

[20] McCormack, *Federalism and Section 1983: Limitation on Judicial Enforcement of Constitutional Protections, Part I,* 60 VA. L. REV. 1, 10 (1974) [hereinafter cited as McCormack].

[21] Pierson v. Ray, 386 U.S. 547, 553-54 (1967); McCray v. Maryland, 456 F.2d 1, 3 (4th Cir. 1972).

[22] *See* McCormack, *supra* note 20, at 11 & n.62.

[23] Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872). In *Bradley,* a federal judge raised the defense of immunity in a suit brought by a lawyer who had been disbarred by the judge. The Supreme Court sustained the immunity defense holding that, in the absence of such a doctrine, the judge's office would be degraded and the judge would be forced to preserve a complete record of his every decision for future defenses. *Id.* at 349.

[24] 42 U.S.C. §§ 1983, 1985 (1970).

[25] *See* note 5 *supra.*

[26] Prosecutors such as Solicitor Foard enjoy a quasi-judicial immunity for their discretionary actions which form an integral part of the judicial process. Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutor's actions of initiating prosecution and in presenting the State's case immune from § 1983 damages suit). In the *Timmerman* situation, where both Solicitor Foard and Magistrate Brown were performing their discretionary duties, quasi-judicial immunity of prosecutors equates to judicial immunity.

[27] Pierson v. Ray, 386 U.S. 547, 554-55 (1967). In *Pierson,* a municipal police justice was extended judicial immunity for acts within his judicial responsibilities. The judge convicted petitioner Ray, a civil rights activist, under a statute making it a misdemeanor to congregate in public so as to cause a breach of the peace. Regardless of the constitutionality of the statute, the judge enjoyed immunity for his actions under the statute. *Id.* at 555.

the question whether this judicial immunity extends to actions seeking only equitable or declaratory relief.[28] The Fourth Circuit in considering this issue has recognized that to extend judicial immunity to actions for equitable relief would render § 1983 meaningless for a most important group of state officials.[29] The court of appeals, in the absence of explicit Supreme Court guidance,[30] has therefore held that judicial immunity does not extend to actions seeking injunctive or declaratory relief under § 1983.[31] This restriction of judicial immunity to damage actions under the Civil Rights Acts balances the need for state judicial autonomy with the federal interest in the protection of civil rights.[32]

The *Timmerman* court held that the district court upset this balance by extending the doctrine of judicial immunity to bar an action for equitable and declaratory remedies under § 1983. The Fourth Circuit, by preserving the availability of these equitable remedies, participated in the present trend of increased concern with prison administration and police and prosecutorial misconduct affecting individual rights.[33] Historically, federal courts were reluctant to interfere with the operation of state prisons. Federal courts exercised this restraint because prison administration was considered a state prerogative[34] and because prisoners were considered citizens who had forfeited a substantial portion of their civil rights.[35] However, the

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[28] *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 553-54 (1967).

[29] McCray v. Maryland, 456 F.2d 1, 3 (4th Cir. 1972).

[30] The decision in Pierson v. Ray, 386 U.S. 547 (1967), has not been expanded by the Supreme Court. *See* Fowler v. Alexander, 478 F.2d 694, 696 (4th Cir. 1973); Littleton v. Berbling, 468 F.2d 389, 406-07 (7th Cir. 1972), *cert. denied*, 414 U.S. 1143 (1974). *But see* Mitchum v. Foster, 407 U.S. 225 (1972) (§ 1983 actions seeking injunctive relief against state judicial and law enforcement officials held to constitute an expressly authorized exception to the Anti-Injunction Act, 28 U.S.C. § 2283 (1970)).

[31] *See, e.g.*, Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973). Fowler challenged the constitutionality of North Carolina's statutes relating to the taxing of costs to prosecution witnesses. His protest to those statutes led to a temporary incarceration for nonpayment of court fees. *Id.* at 696. The Fourth Circuit, although denying injunctive relief for lack of proper standing, held that judicial immunity does not extend to actions for injunctive relief under 42 U.S.C. § 1983 (1970). *Id.*

[32] *See* McCormack, *supra* note 20, at 13-14.

[33] *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964). *See generally* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970) [hereinafter cited as Goldfarb & Singer].

[34] *Id.* at 181-82.

[35] *E.g.*, Price v. Johnston, 334 U.S. 266, 285 (1948). *See* Note, *Judicial Intervention in Prison Administration*, 9 WM. & MARY L. REV. 178, 180-81 (1967); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 516-20 (1963).

Supreme Court's intervention, when prisoner constitutional rights are abridged,[36] has encouraged increased federal judicial involvement in previously ignored state prison administration.[37] In *Timmerman,* the Fourth Circuit maintained this effective § 1983 remedy against state judicial officials who control so directly the constitutional rights of prisoners.

Even though appellees Brown and Foard were denied judicial immunity, they raised a second defense that federal court intervention in an on-going state judicial proceeding[38] was barred by the *Younger v. Harris*[39] abstention doctrine. The Fourth Circuit rejected this defense, finding that the factual situation alleged in *Timmerman*[40] fell within one of the exceptions to the *Younger* doctrine.[41] Under the abstention doctrine, a federal court, in certain circumstances, abstains from the exercise of its validly pleaded jurisdiction.[42] The foundation for abstention rests on a proper respect for state court functions that afford a federal plaintiff a competent forum in which to raise his claims.[43] There are four basic lines of cases which have been variously recognized as justifying federal abstention:[44] first, federal courts avoid deciding constitutional questions where the case may be resolved in a state court on a question of state law;[45]

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[36] *E.g.,* Lee v. Washington, 390 U.S. 333 (1968) (per curiam); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam); Monroe v. Pape, 367 U.S. 196 (1961). *See* Note, *Prisoners Rights under Section 1983,* 57 GEO. L.J. 1270, 1275 (1969).

[37] *E.g.,* Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966).

[38] The Fourth Circuit treated the state proceedings as ongoing since the criminal indictments were issued and had only by error been *nolle prossed.* South Carolina officials indicated that new indictments were to be prepared and presented to the grand jury. 528 F.2d at 811. This characterization of the litigation as pending brought the case within the strictures of *Younger v. Harris,* 401 U.S. 37 (1971). *See also* Gerstein v. Pugh, 420 U.S. 103 (1975) (principles of *Younger v. Harris* apply where state criminal proceedings begin against federal plaintiffs after federal complaint filed); Steffel v. Thompson, 415 U.S. 452 (1974); Samuels v. Mackell, 401 U.S. 66 (1971).

[39] 401 U.S. 37 (1971).

[40] *See* notes 7-14 *supra.*

[41] 528 F.2d at 814-15.

[42] Maraist, *Federal Injunctive Relief Against State Court Proceeding: The Significance of* Dombrowski, 48 TEXAS L. REV. 535, 537 (1970) [hereinafter cited as Maraist].

[43] Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975); Kugler v. Helfant, 421 U.S. 117, 123 (1975); Younger v. Harris, 401 U.S. 37, 44 (1971).

[44] WRIGHT, *supra* note 7, at § 52. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 985-1009 (2d ed. 1973).

[45] The leading case supporting abstention to avert the unnecessary constitutional interpretation problem is Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). In that case, the Court abstained from deciding a fourteenth amendment question that might have resulted in an injunction of an order of the Texas Railroad Commission

second, abstention may be invoked to avoid conflict with state administration of its own affairs;[46] third, in a less widely recognized area, unsettled questions of state law may be deferred to state courts;[47] and finally, in an area as yet unrecognized by the Supreme Court, abstention may be invoked to serve the convenience of the federal courts.[48]

The Supreme Court, however, has declared one important instance when federal courts are not empowered to exercise the discretionary abstention doctrine. In *Dombrowski v. Pfister,*[49] the Court held that a district court's abstention awaiting state interpretation of allegedly overbroad state statutes[50] was an inappropriate application of the doctrine.[51] The Court justified federal injunctive relief barring the threatened prosecution because of the "chilling effect" of the overbroad statute on the plaintiff's exercise of his first amendment rights.[52] This restriction was substantially limited when the Court, in *Younger v. Harris,*[53] held that ongoing state criminal prose-

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until a state court decided whether the Commission had the authority under state law to make such an order. Importantly, this type abstention involves only postponement of an exercise of valid federal jurisdiction while awaiting a state court determination. *See* WRIGHT, *supra* note 7, § 52 at 218-21.

[46] *E.g.,* Rizzo v. Goode, 423 U.S. 362 (1976); Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

[47] *E.g.,* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (condemnation proceeding under unconstrued state statute stayed until state court construed statute); United Services Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir.), *cert. denied,* 377 U.S. 935 (1964). *But see* Meredith v. Winterhaven, 320 U.S. 228 (1943) (difficulties in ascertaining a municipality's power to issue bonds under statute unconstrued by state courts are not sufficient grounds alone to justify abstention).

[48] *E.g.,* Amdur v. Lizars, 372 F.2d 103 (4th Cir. 1967); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949). *But see* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976) (dismissal because of crowded federal court docket held improper application of abstention doctrine).

[49] 380 U.S. 479 (1965).

[50] The statutes challenged in *Dombrowski* were the Louisiana Communist Control Law, Acts of 1952, no. 506 §§ 4-11 (current version at LA. REV. STAT. ANN. §§ 14:358-65 (West 1974)), the Subversive Activities Law, Acts of 1954, no. 623 §§ 1-9 (current version at LA. REV. STAT. ANN. §§ 14:366-73 (West 1974)), and the Communist Propaganda Control Law, LA. REV. STAT. ANN. §§ 14:390-390.8 (West 1974).

[51] 380 U.S. at 489.

[52] *Id.* at 487. In *Dombrowski,* the appellants offered proof that their private records had been raided and that files and records were illegally seized. After a state court quashed warrants issued on this illegally seized evidence, the prosecutor continued to use this evidence in public hearings concerning the activities of the appellants. The Court found that this continued state harassment sufficiently established a situation where the appellants would be subject to irreparable harm if the state proceedings continued. *Id.* at 485-86.

[53] 401 U.S. 37 (1971).

cutions should not be enjoined, even under the *Dombrowski* holding, except where extraordinary circumstances warranted intervention.[54] Such extraordinary circumstances arise when a plaintiff's federally protected rights are subject to "great and immediate" irreparable injury other than the injury incurred by defending oneself in a single lawsuit brought in good faith.[55] Sufficient irreparable injury may be shown by evidence that the state prosecution was brought in "bad faith" or for purposes of "harassment" or that "other unusual circumstances"[56] exist which warrant federal equitable relief.[57] In *Younger*, the Court denied federal injunctive relief to the appellee, who was being prosecuted under a state statute,[58] because he had not shown that he would suffer great and immediate injury in defending a prosecution based upon the application of a statute allegedly unconstitutional on its face.[59] This proscriptive description of bad faith, harassment or other unusual circumstances was clarified by the *Younger* Court when it upheld the *Dombrowski* decision.[60] The *Younger* Court stated that a breakdown of the state judicial system in *Dombrowski* justified federal equitable intervention when a federal plaintiff would suffer a substantial impairment of his first amendment rights while awaiting state adjudication.[61] Supreme Court decisions subsequent to *Younger* have reiterated the extreme reluctance of federal courts to interfere with state criminal prosecutions.[62] The Supreme Court has

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[54] *Id.* at 43.

[55] *Id.* at 46, *citing* Fenner v. Boykin, 271 U.S. 240 (1926). *See* Cousins v. Wigoda, 409 U.S. 1201 (1972).

[56] Kugler v. Helfant, 421 U.S. 117 (1975) defined these unusual circumstances as not encompassing merely unusual factual situations but rather those situations which create an extraordinary pressing need for immediate federal equitable relief. *Id.* at 124-25.

[57] 401 U.S. at 54. One issue not addressed in *Younger*, yet important to the analysis of *Timmerman*, involved the effect of the Anti-Injunction Act, 28 U.S.C. § 2283 (1970), on the federal judiciary's power to issue injunctions in pending state proceedings. This issue was resolved when the Supreme Court later held that § 1983 falls within the "expressly authorized" exception to the Anti-Injunction Act. Mitchum v. Foster, 407 U.S. 225, 243 (1972). *See* note 30 *supra*.

[58] The state statute involved in the controversy was the California Criminal Syndicalism Act, CAL. PENAL CODE §§ 11400-11401 (1970).

[59] 401 U.S. at 54.

[60] *Id.* at 47-49.

[61] *Id.* at 48-49.

[62] *See* Rizzo v. Goode, 423 U.S. 362, 378 (1976); Huffman v. Pursue Ltd., 420 U.S. 592, 610 (1975); Cousins v. Wigoda, 409 U.S. 1201, 1206 (1972). *See generally* Zeigler, *An Accommodation of the* Younger *Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266 (1976).

determined that federal courts must survey the full range of circumstances surrounding state prosecutions when deciding whether a federal plaintiff has met the severe burden of proving manifest bad faith[63] and injury which is "great, immediate and irreparable."[64]

Timmerman identifies one set of factual circumstances constituting a case of bad faith and harassment sufficient to remove state criminal proceeding from the protection afforded by the *Younger* abstention doctrine. The Fourth Circuit found that three elements combined to constitute sufficient cause for federal judicial intervention: the double indictment of appellees Timmerman and Thomas; Magistrate Brown's finding that probable cause existed to indict the correctional officials who participated in the beating of Timmerman; and Solicitor Foard's illegal attempts to suppress the prosecution of those officials.[65] The court emphasized that an indictment, dismissal and re-indictment on substantially identical charges did not alone give rise to an inference of prosecution without reasonable expectation of conviction.[66] However, when these factual circumstances combine with a finding by a competent judicial official that probable cause existed to prosecute the antagonists of the original defendants, the court held that it could justifiably infer that a substantial doubt existed as to the good faith prospects for a conviction against those persons allegedly attacked.[67] This inference gained support from the fact that Solicitor Foard resorted to illegal measures to suppress the criminal warrants issued against the state officials.[68]

Timmerman represents an accomodation of competing state and federal interests in applying the abstention doctrine.[69] The state has a proprietary interest in prison administration and security which dictates a substantial measure of autonomy.[70] The federal interest is in the protection of prisoners' constitutional rights such as free

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[63] Bad faith means that a prosecution has been brought "without a reasonable expectation of obtaining a valid conviction." Kugler v. Helfant, 421 U.S. 117, 126 n.6 (1975). *See* Perez v. Ledesma, 401 U.S. 82, 85 (1971).

[64] Allee v. Medrano, 416 U.S. 802, 836 (1974) (Burger, C.J., concurring and dissenting). *See* note 62 *supra.*

[65] 528 F.2d at 815.

[66] *Id.*

[67] *Id.*

[68] *Id. See* text accompanying note 12 *supra.* The subjective intent of Solicitor Foard is relevant to the *Younger* bad faith determination in *Timmerman. See* Carey, *Federal Court Intervention in State Criminal Prosecutions,* 56 MASS. L.Q. 11, 20 (1971).

[69] *Cf.* Hicks v. Miranda, 422 U.S. 332, 356-57 (1975) (Stewart, J., dissenting); Younger v. Harris, 401 U.S. 37, 56 (1971) (Stewart, J., concurring).

[70] *See generally* Goldfarb & Singer, *supra* note 33, at 181-83.

speech, equal protection, and due process of law.[71] In *Timmerman*, where state officials were directly threatening constitutional rights under the guise of state criminal action that did not further prison security, federal abstention to avoid conflict with state administration of its own affairs lost importance.[72] Further, federal intervention would be effective with only a small intrusion upon the state domain. Relief could be framed narrowly against minor prison officials requiring minimal infringement on the legitimate concern of the state controlling the actions of its officials.[73] The granting of federal injunctive relief in *Timmerman* places this case among those rare exceptions to the *Younger* doctrine;[74] factual situations that can meet the bad faith and harassment test have aptly been described as falling within the "bearded, one-eyed, red-haired man with a limp" category.[75] In *Timmerman*, the Fourth Circuit remained within the *Younger* strictures by not expanding the grounds for federal intervention in ongoing state litigation.

JON P. LECKERLING

C. Standing to Sue: Plaintiffs as Taxpayers, Citizens and Congressmen

Standing to sue is a judicially-imposed limitation upon the jurisdiction of federal courts that is derived from the "case and controversy" restrictions of article III of the Constitution.[1] Inherent

[71] U.S. CONST. AMEND. I, XIV.

[72] *See* text accompanying note 46 *supra;* Maraist, *Federal Intervention in State Criminal Proceedings:* Dombrowski, Younger *and Beyond,* 50 TEXAS L. REV. 1324, 1346 (1972).

[73] Maraist, *Federal Intervention in State Criminal Proceedings:* Dombrowski, Younger *and Beyond,* 50 TEXAS L. REV. 1324, 1340 (1972).

[74] Younger v. Harris, 401 U.S. 37, 42-45 (1971).

[75] Maraist, *supra* note 42, at 536.

[1] U.S. CONST. art. III, § 2, states that judicial power is limited to cases and controversies. Standing, along with ripeness, mootness, collusive suits and political questions comprise the constitutional limitations on federal jurisdiction known as justiciability. Hennigan, *The Essence of Standing: The Basis of a Constitutional Right to be Heard,* 10 ARIZ. L. REV. 438, 438 (1968). The earliest consideration of jurisdictional limitations in relation to the "case and controversy" clause occurred in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803), where the court determined that it could exercise review only within the framework of a lawsuit with parties presenting adverse interests in which they were seeking favorable decision. For a discussion of standing, see Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601 (1968) [hereinafter

within the doctrine of standing is the issue of a federal court's right to deny jurisdiction to citizen and taxpayer actions brought against the government.[2] Recently the Fourth Circuit considered *Harrington v. Schlesinger*,[3] where the court of appeals denied plaintiffs standing to challenge the executive spending of funds for the support of military operations in Southeast Asia.[4]

In *Harrington*, the plaintiffs sought standing as taxpayers, citizens, and congressmen, alleging that the federal government, by spending money to support activities in Southeast Asia,[5] had violated two appropriations acts[6] and article 1, § 9, cl. 7 of the Constitution.[7]

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cited as Davis]; Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961); Tucker, *The Metamorphosis of the Standing to Sue Doctrine*, 17 N.Y.L.F. 911 (1972) [hereinafter cited as Tucker].

[2] The leading authority for the proposition that a person asserting only his status as a taxpayer lacks standing to bring suit against the government is Frothingham v. Mellon, 262 U.S. 447 (1923). The Court in *Frothingham* held that a taxpayer had no standing to sue a government official where the taxpayer had suffered no direct injury as a result of the expenditures of which she complained. *Id.* at 488. For an analysis of *Frothingham* see Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).

[3] 528 F.2d 455 (4th Cir. 1975).

[4] *Harrington* was one of a number of cases which were brought in reaction to United States military involvement in Southeast Asia. Other cases included: Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Mottola v. Nixon, 464 F.2d 178 (9th Cir. 1972); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); Atlee v. Laird, 339 F. Supp. 1347 (E.D. Pa. 1972).

[5] 528 F.2d at 456. These activities were specified as the support of foreign mercenaries, the continued attachment of American military advisors to combat units, providing American planes for reconnaissance missions in support of bombing, and the conduct of clandestine activities. *Id.*

[6] The two Acts were part of the Second Supplemental Appropriations Act of 1973, which prohibited the spending of funds to support United States combat forces in Southeast Asia after August 15, 1973. Pub. L. No. 93-50, § 307, 87 Stat. 129 (1973) provides:

> None of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam. . . by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other Act may be expended for such purpose[s].

Pub. L. No. 93-52, § 108, 87 Stat. 134 (1973) states:

> Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United

Declaratory and injunctive relief was sought to end shipments of ordnance, stop the use of United States forces in Southeast Asia, and halt government spending on alleged "prohibited activities."[8] The district court granted a motion to dismiss on the grounds that the case involved an unjusticiable political question.[9] On appeal the Fourth Circuit affirmed, finding that the plaintiffs lacked standing to sue. In reaching its decision, the court considered but rejected plaintiffs' arguments concerning their asserted standing as taxpayers, citizens and congressmen.

The *Harrington* court applied the two-prong nexus test first established in *Flast v. Cohen*[10] and concluded that the plaintiffs as taxpayers failed to present a constitutional challenge to congressional appropriations. In *Flast*, the plaintiffs asserted their status as taxpayers and alleged that federal funds disbursed by federal officials under the Elementary and Secondary Education Act of 1965[11] for use in religious schools violated the "establishment" and "free exercise" clauses[12] of the first amendment.[13] Recognizing that some confusion had grown out of previous cases,[14] the Court decided to reexamine the standing doctrine in relation to taxpayer suits. The Court set up a two-part nexus test whereby individuals were required to demonstrate their stake as taxpayers in the outcome of litigation in which they were challenging the constitutionality of a federal spending program. The first part of the test required a determination of "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."[15] The plaintiffs in *Flast* met this requirement because they directly challenged the spending and taxing power

States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.

[7] U.S. CONST. art. I, §9, cl. 7 provides: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law. . . ."

[8] 528 F.2d at 456. These activities were prohibited by the appropriations acts. *See* note 6 *supra.*

[9] Harrington v. Schlesinger, 373 F. Supp. 1138, 1142 (E.D.N.C. 1974).

[10] 392 U.S. 83 (1968). In *Flast,* the plaintiffs had standing. Their complaint was consistent with the case and controversy limitation because of assertions that tax money was being spent in violation of a specific clause of the Constitution. *Id.* at 103.

[11] 20 U.S.C. §§ 241a *et. seq.,* 821 *et. seq.* (1970).

[12] U.S. CONST. amend. I.

[13] 392 U.S. at 85.

[14] The Court specifically referred to *Frothingham,* 392 U.S.at 94. *See* note 2 *supra.* The *Frothingham* decision had the practical effect of removing the spending power from the scope of judicial review and it tended to place a broad ban on suits by federal taxpayers challenging appropriations. C. WRIGHT, LAW OF FEDERAL COURTS 44 (3d ed. 1976).

[15] 392 U.S. at 102.

of Congress.[16] The second part of the test required an allegation that the challenged federal appropriations statute exceeded specific constitutional limitations on the taxing and spending power of Congress. The plaintiffs in *Flast* met this requirement by asserting that the establishment clause[17] created a limitation upon congressional taxing and spending power.[18]

The *Harrington* court utilized the requirements of *Flast* holding that the plaintiff taxpayers failed to present a constitutional challenge to a congressional appropriation.[19] Although the plaintiffs claimed that there were constitutional limitations upon executive expenditures, the Fourth Circuit saw no real controversy concerning the application of such expenditures, but interpreted the issue as one involving different views of the appropriations acts.[20] The court's interpretation was supplemented by its recognition of the possibility of an executive making a "clear and flagrant" violation of congressional limitations upon expenditures. In such a situation, judicial intervention would be appropriate.[21] In *Harrington*, the Fourth Circuit reasoned that because the plaintiffs sought only judicial interpretation of the statutes, they failed to present an issue of constitutionality.[22] Through this analysis of the issues in *Harrington*, the court refused to find a cause of action by taxpayers challenging the constitutionality of executive expenditures.[23]

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[16] *Id.* at 102-03. Plaintiffs' challenge in *Flast* met this test because they questioned the exercise of congressional power under Art. I, § 8 of the Constitution. *Id.*

[17] 392 U.S. at 103.

[18] *Id.* at 105-06. Problems resulting from the two part nexus test of *Flast* became readily apparent because "it is arguable that all constitutional prescriptions are intended for the protection of that class of citizens which is at any one time disadvantaged by the failure to observe the constitutional requirement." Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1045 (1968); Note, *Federal Standing: 1976*, 4 HOFSTRA L. REV. 383, 390 (1976) [hereinafter cited as *Federal Standing*].

[19] 528 F.2d at 457.

[20] *Id.* at 458.

[21] *Id.* The court stated, however, that *Harrington* did not present a situation in which there was a clear and flagrant violation of congressional limitations. *Id.*

[22] The Fourth Circuit in *Harrington* compared its conclusion of a lack of an issue concerning constitutionality with *Reservists*. *See* text accompanying notes 32-34 *infra*.

> While the effort in . . . [*Reservists*] to compel attempts to recover payments to reservists while members of Congress presented the question of the status of reservists as officers of the United States within the meaning of the Incompatibility Clause, in this case [*Harrington*] there is simply no issue involving the application and interpretation of any constitutional provision.

528 F.2d at 458.

[23] 528 F.2d at 458.

The factual distinctions between *Harrington and Flast,* however, should have led the Fourth Circuit to view the facts apart from the *Flast* test in reaching its decision. In *Flast,* the plaintiffs sought to challenge the constitutionality of congressional appropriations. In contrast, the *Harrington* plaintiffs did not question Congress's power to make such appropriations, but sought to require executive spending to comport with those appropriations.[24]

In an effort to limit taxpayer standing, the Fourth Circuit in *Harrington* followed the current trend to give the *Flast* decision a strict reading.[25] Moreover, the plaintiffs failed to allege other possible grounds for establishing standing.[26] The reasons for *Harrington's* restriction of taxpayer standing are not persuasive in the face of a factual situation that involved a tangible injury to taxpayers if allegations of wrongdoing proved accurate. By applying the limitations of the *Flast* test, courts have assumed that they would be considering only those cases capable of judicial review in a truly adversary context, thereby preventing the crowding of dockets with cases where plaintiffs pursue generalized grievances concerning government fiscal policy.[27]

In support of its holding that the plaintiffs failed to claim a real constitutional controversy, the *Harrington* court compared its approach to that of the Supreme Court in *United States v. Richardson.*[28]

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[24] In *Flast and Harrington,* the plaintiffs brought actions as taxpayers alleging injuries to themselves resulting from unauthorized expenditures. Although the type of expenditures in the two cases differed, the plaintiffs' relationship to those expenditures (that of taxpayers) was the same.

[25] Three recent Supreme Court cases establishing rigid criteria for standing have led to restrictive interpretations of the doctrine. Warth v. Seldin, 422 U.S. 490 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974). *See Federal Standing, supra* note 18, at 383.

[26] The nexus test established in *Flast* is but one method of ascertaining the extent of a taxpayer's particular injury. *See generally* Davis, *supra* note 1, at 604-08. Other grounds upon which plaintiffs have successfully attained standing include: abstract interests: Fairchild v. Hughes, 258 U.S. 126 (1922); Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970), widespread injury: United States v. SCRAP, 412 U.S. 669 (1973).

[27] *See* Holtzman v. Schlesinger, 414 U.S. 1316, 1318-19 (1973); Hallman v. Phillips, 409 F. Supp. 423, 426 (E.D.Pa. 1976); Metcalf v. National Petroleum Counsel, 407 F. Supp. 257, 258 (D.D.C. 1976).

[28] 418 U.S. 166 (1974). In *Richardson,* a federal taxpayer was denied standing to bring suit for the purpose of declaring unconstitutional that portion of the CIA Act, 50 U.S.C. § 403j(b) (1970), which holds the agency accountable for its expenditures solely on the certificate of the Director. The plaintiff intended to use this declaration to obtain information concerning CIA funding, so that he might contest those appropriations. In denying the plaintiff standing, the Court found this to be a generalized grievance with no logical nexus between the plaintiff's station as a taxpayer and the asserted failure of Congress to require detailed expenditure reports. 418 U.S. at 175.

Richardson strictly applied the *Flast* test to bar judicial review of the constitutionality of the statute outlining CIA funding procedures. The link between taxpayer status and the need for information concerning spending was tenuous at best, since there was no clear nexus established that caused a direct injury to the taxpayer.[29] The *Richardson* court appeared to confine taxpayer challenges to acts of Congress specifically limited by the taxing and spending clause.[30] The issue presented by *Harrington,* however, was different. In *Harrington,* the challenge was to the interpretation of a statute, not its basic constitutionality. Because the Fourth Circuit approached *Harrington* in the same manner as the Supreme Court approached *Richardson* it failed to recognize these differences and the import of an injury suffered by the Executive's alleged failure to comply with the statutes.[31]

In denying standing to the *Harrington* taxpayers, the Fourth Circuit also relied upon the Supreme Court's interpretation of *Flast* in *Schlesinger v. Reservists Committee to Stop the War.*[32] In *Reservists,* the plaintiffs brought a class action on behalf of United States citizens and taxpayers, challenging congressmen's membership in the military reserves.[33] Although the *Reservists* claim for taxpayer standing was stronger than the *Harrington* claim, standing was denied. The Fourth Circuit believed that the plaintiffs in *Reservists* had a stronger claim because that case concerned the issue of the status of reservists as congressmen within the meaning of the incompatibility clause,[34] while *Harrington* did not involve the interpretation of any constitutional provision.[35]

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[29] 418 U.S. at 175. In *Richardson,* the plaintiff failed to allege that he was "in danger of suffering any particular concrete injury. . . ." 418 U.S. at 177. The Court found that the asserted injury, which was in fact shared by all citizens, was merely a "generalized grievance." *Id.* at 176.

[30] *See* Note, *The Continued Vitality of the Standing Doctrine In Challenges to Federal Government Action,* 24 CATH. U.L. REV. 328, 337 (1975).

[31] *See* text accompanying notes 5-8 *supra.*

[32] 418 U.S. 208 (1974).

[33] In *Reservists,* the Supreme Court found that the respondent association of present and former members of the armed forces lacked standing as taxpayers to challenge the reserve officer status of members of Congress, allegedly in violation of the incompatibility clause of the Constitution. U.S. CONST. art. I, § 6, cl. 2. The logical nexus between taxpayer status and the specific limitation on congressional spending power had not been established. A concrete injury must be shown, which "adds the essential dimension of specificity. . . by requiring that the complaining party have suffered a particular injury. . . ." 418 U.S. at 221.

[34] U.S. Const. art. I, § 6, cl. 2.

[35] 528 F.2d at 458. The Fourth Circuit qualified its differentiation of *Reservists* by stating that in *Harrington,* "[a]ll that is sought is judicial interpretation of the stat-

In considering the plaintiffs' claim of standing as citizens interested in enforcing the Constitution, the *Harrington* court readily disposed of the claim by citing to the holding of *Reservists,* which held any undifferentiated interest or speculative injury insufficient to meet the "case and controversy" requirement of the Constitution.[36] The *Richardson* decision also reached the same conclusion on the plaintiff's allegation that he needed the CIA funding information to perform his obligations as a voter.[37] A concerned citizen may not bring a suit in support of his general interest in the lawful conduct of the federal government if he suffers no sufficiently direct injury.[38] *Reservists* and *Richardson* reflect the position that a citizen's general complaints concerning the conduct of the federal government should not be heard by the judiciary. Instead, such matters are more capably resolved in democratic forums where citizens can air their grievances and prevent excesses by elected representatives through withdrawal of support.[39] The judicial forum should be used sparingly to preserve the rights of individuals and minorities rather than to protect citizens at large from the excesses of their legislators.[40]

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utes, as applied, and injunctive relief should that interpretation go in the plaintiffs' favor." *Id.*

[36] U.S. CONST. art III, § 2. 528 F.2d at 458-59. The Supreme Court distinguished its holding in *Reservists* concerning citizen standing from Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) and United States v. SCRAP, 412 U.S. 669 (1973) by stating,

> [i]t is one thing for a court to hear an individual's complaint that certain specific government action will cause that person private competitive injury. . . or a complaint that individual enjoyment of certain natural resources has been imparied by such action. . . but it is another matter to allow a citizen to call on the courts to resolve abstract questions.

418 U.S. at 223.

[37] United States v. Richardson, 418 U.S. 166, 176 (1974). In this determination the Court relied heavily upon *Ex parte* Levitt, 302 U.S. 633 (1937), in which a citizen challenged the appointment of Justice Black to the Supreme Court. The Court in *Levitt* held that the citizen-petitioner had only a "general interest" in the action, because he failed to show that he had "sustained or [was] immediately in danger of sustaining a direct injury. . . ." *Id.* at 634.

[38] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); *Ex parte* Levitt, 302 U.S. 633 (1937); Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied,* 396 U.S. 1042 (1970).

[39] C. WRIGHT & A. MILLER, 13 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3531, at 225 (1975).

[40] *Id. See* Brown, *Quis Custodiet Ipsos Custodes?-The School-Prayer Cases,* 1963 SUP. CT. REV. 1. Concerning the limitations upon judicial power, Professor Brown stated, "[o]ur bargain is that the Court should have power, but will use it sparingly; the restriction is integral to the bargain." *Id.* at 3-4.

The *Harrington* court also considered the issue of a congressman's standing to sue in light of the stringent standards applied by other federal courts.[41] The court relied upon the Second Circuit case of *Holtzman v. Schlesinger*,[42] where the plaintiff-congresswoman alleged denial of her right to vote on the issues of bombing and other military activities in Cambodia. In *Holtzman*, the court stated that the plaintiff did not have standing to challenge the legality of bombing in Cambodia, when in fact she had not been denied the right to vote on the issue.[43] The Fourth Circuit in *Harrington* concluded that once proposed legislation has become law, a congressman's interest is the same generalized interest as that of any citizen, and thus is insufficient to invoke standing to challenge governmental action.[44] This position seems to reflect the viewpoint that while legislators may represent their constituents in the legislature, they are not better suited to represent them in the courts than are the citizens themselves.

In its denial of standing to the plaintiffs in *Harrington*, the Fourth Circuit was not wholly successful in its application of existing case law.[45] Preoccupation with applying the *Flast* test resulted in the court's failure to recognize substantive differences between the plaintiffs' causes of action. *Harrington* reflects the necessity for a more relaxed view of standing so that courts may initially review the merits of the case to determine the issues and injuries involved before applying a pre-existing standing formula.

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[41] Holtzman v. Schlesinger, 484 F.2d 1307 (2d. Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Gravel v. Laird, 347 F. Supp. 7 (D.D.C. 1972).

[42] 484 F.2d 1307 (2d Cir. 1973). In *Holtzman*, standing was denied due to the political question limitation of justiciability. Specifically, the court stated that it was in no position to decide the status of Cambodian insurgents in relation to North Vietnamese Communists. The court concluded that "[w]hile we as men may well agonize and bewail the horror of this or any war, the sharing of Presidential and Congressional responsibility particularly at this juncture is a bluntly political and not a judicial question." *Id.* at 1311.

[43] *Id.* at 1315.

[44] 528 F.2d at 459.

[45] In a fact situation not lending itself to the requirements of the *Flast* test, the Fourth Circuit combined its application of those requirements with the Supreme Court's subsequent interpretations of *Flast* in *Richardson* and *Reservists*. The result is a confusing combination of case law that does not apply to the claims for relief in *Harrington*. *See* text accompanying notes 25-33 *supra*.